Supreme Court, U.S.
FILED
FEB 6 2003

No. 02-1064

IN THE

Supreme Court of the United States

PETER ROEHSLER,

Petitioner,

v.

MIDDLESEX COUNTY, NEW JERSEY,
HEALTH DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Counter-Statement of the Case	1
Preliminary Statement	1
Counterstatement of Facts	2
Procedural History	5
Summary of Argument	6
Reasons for Denying the Petition	8
POINT I	
The Recycling Compliance Programs Of The Middlesex County Health Department Conform To Statutory And Settled Constitutional Standards	8
POINT II	
Middlesex County Health Department Is Entitled By Statute To Its Fees Upon Prevailing On Petitioner's Challenge To The Inspection	14
Conclusion	16

TABLE OF CITED AUTHORITIES

CASES CITED *Page*

A.A. Mastrangelo, Inc. v. Commissioner of Department Of Envt'l. Protection, 90 N.J. 666 (1982) 12

Atlantic Coast Demolition & Recycling, Inc. v. Bd. Of Chosen Freeholders of Atlantic County et al., 48 F.3d 701 (1995)..... 13

Camara v. Municipal Court, 387 U.S. 523 (1967) ... 11

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) 11

Donovan v. Dewey, 452 U.S. 594 (1981) 11

In re Martin, 90 N.J. 295 (1982) 11

New Jersey Dep't of Envt'l. Protection v. Duran, 251 N.J. Super. 55 (App. Div. 1991) 11-12

New Jersey Transit PBA Local 304 v. New Jersey Transit, 147 N.J. 259 (1997) 12

New York v. Burger, 482 U.S. 691 (1987) 11, 13

Southern Ocean Landfill v. Mayor of Ocean Township, 64 N.J. 190 (1974)..... 13

Cited Authorities

	Page
Transport Workers' Union of Philadelphia, Local 234 v. Southeaster Pennsylvania Transp. Auth., 884 F.2d 709 (3d Cir. 1989)	11, 14
United States v. Biswell, 406 U.S. 311 (1972)	11
UNITED STATES CONSTITUTION	
Fourth Amendment	10
STATUTES CITED	
N.J.S.A. 2C:29-1	3
N.J.S.A. 7:1G-1.5	3, 10
N.J.S.A. 13:1E-1, *et seq.*	2
N.J.S.A. 13:1E-2	12
N.J.S.A. 13:1E-9(d)(2)	7, 14
N.J.S.A. 13:1E-23	2
N.J.S.A. 13:1E-23(g)-(h)	2
N.J.S.A. 26:3A2-21, *et seq.*	2
N.J.S.A. 26:3A2-22	3, 9

Cited Authorities

Page

N.J.S.A. 26:3A2-23(e) 3, 10

N.J.S.A. 26:3A2-25 3

REGULATION CITED

N.J.A.C. 7:1G-1.5 ..... 3, 10

COUNTER-STATEMENT OF THE CASE

PRELIMINARY STATEMENT

The recycling and solid waste laws in New Jersey govern a pervasively regulated industry that has been a matter of grave public concern for several decades and oft-times in crisis. Respondent Middlesex County Health Department has been expressly authorized by the New Jersey Department of Environmental Protection to conduct environmental inspections of commercial properties in order to monitor compliance with the recycling and solid waste regulations. This State has expended considerable time and resources to cleanup the environment and bring the waste industries into the modern era of recycling, proper end-use and a competitive marketplace. New Jersey can ill afford to have further environmental harm done by commercial and industrial establishments that might opt for the protection of privacy and darkness to engage in waste disposal activities.

In October 2000, Middlesex County attempted to conduct a routine recycling inspection of an industrial complex owned and operated by Petitioner Roehsler, doing business as the Viking Terminal in Sayreville, New Jersey. Petitioner refused to allow any entry by county inspectors and threatened criminal response. Proper resort to the courts has resulted in a determination that Middlesex County has the authority to undertake that inspection and has not violated the constitutional rights of the Petitioner. The Courts below have upheld that reasonable determination. This Court should leave those holdings undisturbed.

COUNTERSTATEMENT OF FACTS

Pursuant to its obligations under the Solid Waste Management Act, N.J.S.A. 13:1E-1, *et seq.* ("SWMA"), Middlesex County ("County") developed and adopted the Middlesex County Solid Waste Management Plan ("County Plan") which comprehensively sets forth the County's solid waste disposal and recycling strategies. These strategies include "procedures for coordinating all activities related to the collection and disposal of solid waste by every person engaging such process within the solid waste management district." N.J.S.A. 13:1E-1. Public notice and hearings were held on the development and proposal of the County Plan in accordance with the provisions of SWMA. The public hearings afforded all interested persons an opportunity to submit comments and formal written objections to the County Plan. N.J.S.A. 13:1E-23. The County Plan was duly adopted by the County and then approved by the New Jersey Department of Environmental Protection ("NJDEP"), after notice to all relevant government agencies for comment. N.J.S.A. 13:1E-23(g)-(h).

The Middlesex County Health Department ("Department") is designated and certified by the NJDEP as the local environmental health agency under the County Environmental Health Act, N.J.S.A. 26:3A2-21, *et seq.* ("CEHA"). CEHA provides for the administration of environmental health services by county departments of health throughout the State utilizing uniform performance standards promulgated by NJDEP. Pursuant to CEHA, the Department is empowered to act on behalf of NJDEP in Middlesex County and to enforce the various State statutes, rules and regulations relating to environmental health, including, but not limited to, SWMA and the County Plan. CEHA further provides that

the administration of the responsibilities of a CEHA county health department shall include the following:

> The monitoring and enforcement of environmental health standards, the operation of a technical resource center and the enactment and enforcement of environmental health ordinances to control air pollution, solid waste, hazardous waste, noise, pesticides, radiation, and water pollution, to protect workers and the public from hazardous substances and toxic catastrophes, and to protect against other threats to environmental health.

[N.J.S.A. 26:3A2-22] CEHA defines "monitor" to mean "check, test, observe, survey or **inspect to determine compliance** with environmental health standards." N.J.S.A. 26:3A2-23(e) (emphasis added). A CEHA certified agency also has been delegated the authority granted to the NJDEP to act as its agent in areas involving environmental health. This includes the right to enter and inspect "any business premise or building during normal hours or other reasonable times." N.J.A.C. 7:1G-1.5. Failure by a business to allow such an inspection after presentation of official credentials is a criminal offense. N.J.S.A. 2C:29-1. Thus, CEHA expressly confers upon county health agencies the authority to conduct inspections in order to determine compliance with the County Plan and SWMA. N.J.S.A. 26:3A2-25.

Viking Terminal ("Terminal") is a large industrial park owned and operated by Petitioner Peter Roehsler in an industrial section of Sayreville, New Jersey. Within the Terminal, Roehsler operates his marine supply business, Viking Terminal Marine Company ("Viking Marine") and

leases space within the Terminal to several other businesses, which also operate on the property. According to the records of the Sayreville Bureau of Fire Safety, the businesses located at the Terminal include Elmar Trucking, M.T. Performance, Delcanzo Trucking, Avalanchi Global, Santora Electric, Silver Star, Dave's Towing, Allegro Enterprises, Advanced Cleaning Systems, Riccardi Trucking, B&T Auto, Ju Jo Livery, RTM Contractors, Al's Cycle and Atlantic Fabricators, in addition to Viking Marine.

These businesses involve services related to automotive, trucking, electrical, cleaning, air conditioning and fabrication. As such, it is axiomatic that these industrial sites could result in the generation of highly regulated waste products and recyclables, such as motor oil, coolants, chemicals, metals and tires. These materials, if not properly recycled or disposed of, can pose a dangerous threat to the public's health and safety and the environment. As with other business and commercial establishments, the Department conducts regular recycling compliance inspections in order to ensure that these waste materials are being properly handled.[1]

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1. The compliance requirements for commercial and institutional owners, operators and contractors is set forth in the County Plan, Chapter 3, Section C(10)(c). They include the requirements that:

> 3. It must be clear to an inspector that the [recycling] system is being serviced: i.e., containers must be clearly marked and the area neatly maintained; there must not be garbage in the recyclables or recyclables in the garbage; container capacity must be adequate to hold materials between pick-ups.

• • •

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On or about October 2, 2000, the Department attempted to conduct a recycling compliance inspection of the Viking Terminal pursuant to its authority and responsibility under SWMA and CEHA. Petitioner refused to allow the Department's inspectors to enter the Terminal. Thereafter, despite the presentation of credentials and legal authority to undertake the inspection, Petitioner remained steadfast in his refusal to allow the Department to conduct a compliance check. In fact, Petitioner threatened that any Department employees would be treated as criminal trespassers. The Department had no recourse but to seek judicial intervention.

PROCEDURAL HISTORY

On December 28, 2000, the Department filed a Verified Complaint and Order to Show Cause seeking an order of entry onto the Viking Terminal property for the purpose of conducting its recycling compliance inspection. An Order to Show Cause was entered on January 10, 2001, ordering Petitioner to show cause why the relief requested should not be granted. Petitioner filed an Answer on January 29, 2001. An initial hearing was held on February 16, 2001, before the Honorable Marina Cordemus, J.S.C. Judge Cordemas carried the matter. Following reassignment of the matter to the Honorable Melvin Gelade, J.S.C., a second hearing held on July 6, 2001. The court orally entered an order that directed

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(Cont'd)

> 5. The owner/operator/contractor is responsible for arranging for the recyclables to be moved from the premises and for assuring that they go into the recyclables market. . . .

[Pa24]

Petitioner to allow the inspection to be conducted within thirty (30) days. The court also denied Petitioner's request for a stay. A conforming order was entered on July 20, 2001, which included provision for the payment by Petitioner of $5,000 in fees to the Department if this appeal was not successful. (Pet. App. 10a-12a)

On August 3, 2001, Petitioner filed his Notice of Appeal and an emergent application seeking a stay of the trial court's order. The New Jersey Appellate Division denied the latter application by order entered on August 10, 2001. On June 11, 2002 the Appellate Division affirmed the trial court holding the arguments were "without significant merit to warrant discussion . . ." (Pet. App. 1a-4a).

On October 17, 2002, the New Jersey Supreme Court denied Petitioner's petition for certification and dismissed his appeal. (Pet. App. 9a). This application for a writ followed.

SUMMARY OF ARGUMENT

Administrative searches conducted pursuant to the recycling compliance programs of the Middlesex County Health Department conform to statutory and established constitutional standards, thus, there is no compelling reason to grant this writ. Petitioners business, as well as other tenants of his industrial park, are involved in activities likely to generate highly regulated waste products. This Court, as well as the courts of the State of New Jersey, have held that in a pervasively regulated industry such as this, warrantless searches may be conducted so long as there is a "substantial" government interest, the inspections are necessary to further the regulatory scheme and the inspection

program in terms of certainty and regularity of its application provides an adequate substitute for a warrant. The recycling compliance programs of the County meet these standards. Petitioner's argument that a writ must issue because a warrant is needed to search must fail because the case law in this area is well settled and the opinions below so holding are not in conflict with any settled precedent. In short, there are no compelling reasons for granting Petitioner's application for a writ of certiorari.

The Middlesex County Health Department is entitled to its fees upon prevailing on Petitioner's challenge to the inspection. Pursuant to N.J.S.A. 13:1E-9(d)(2), the Health Department is entitled to a fee award where an inspection is blocked by the defendant. An Order to this affect was submitted to the trial court, the fee portion asking for $12,490.46 supported by documentation. Petitioner objected to the fee arguing lack of notice and that the fee was inappropriate. Petitioner did not request argument nor did he question the amount sought. Nonetheless, the trial court reduced the award to $5,000. This process and fee amount has been upheld by latter court opinions. Clearly, Petitioner was given the opportunity to object, did so and in effect was partially successful. His due process rights remain in tact. Again, there is no compelling reason to grant Petitioner's application for a writ on the issue of fees.

REASONS FOR DENYING THE PETITION

POINT I

THE RECYCLING COMPLIANCE PROGRAMS OF THE MIDDLESEX COUNTY HEALTH DEPARTMENT CONFORM TO STATUTORY AND SETTLED CONSTITUTIONAL STANDARDS

Petitioner challenges the authority of the Department to inspect his commercial property for compliance with the environmental laws and regulations of this State as violative of the Fourth Amendment to the United States Constitution. This argument is plainly without merit and must fail. The authority of the Department to conduct routine inspections is clearly and properly premised upon State statutes and regulation, and does not contravene any constitutional provisions.

The Department's authority to inspect the Viking Terminal derives from the Recycling chapter of the County Plan. That document sets forth in relevant part as follows:

> The Middlesex County Field Recycling Inspection Team will **conduct a year-round inspection program to assure that multi-family, commercial and institutional generators of solid waste and recyclables understand and comply with their responsibilities under the County Plan and State law.** This generator inspection program will operate in all municipalities. Follow-up inspections will be made to generators found to be in violation of the compliance provisions of this plan. Notices of

> Violation and Penalty Assessments will be issued as appropriate. The inspectors will be members of the County Health Department and derive authority from the Solid Waste Management Act (N.J.S.A. 13:1E-1 *et seq.*) via the County Environmental Health Act. (N.J.S.A. 26:3A2-21, *et seq.*) The Penalty Schedule for recycling violations will be between $25 and ~~$2,500~~.
>
> (Emphasis Added)

[County Plan, Chapter 3, Section C(6)(c)]

As set forth in the Statement of Facts, *supra*, the Department has been certified as the local CEHA agency with responsibility to enforce and monitor compliance with the County Plan, as well as SWMA and other environmental statutes, rules and regulations. CEHA specifically provides that the administration of the responsibilities of a CEHA county health department shall include the following:

> The monitoring and enforcement of environmental health standards, the operation of a technical resource center and the enactment and enforcement of environmental health ordinances to control air pollution, solid waste, hazardous waste, noise, pesticides, radiation, and water pollution, to protect workers and the public from hazardous substances and toxic catastrophes, and to protect against other threats to environmental health.

[N.J.S.A. 26:3A2-22]

CEHA defines "monitor" to include "check, test, observe, survey or **inspect to determine compliance** with environmental health standards." N.J.S.A. 26:3A2-23(e) (emphasis added). A CEHA certified agency also has the delegated authority granted to the NJDEP to act as its agent in areas involving environmental health. This includes the right to enter and inspect "any business premise or building during normal hours or other reasonable times." N.J.A.C. 7:1G-1.5. Accordingly, there can be no doubt that the Department had the statutory and regulatory authority to inspect the Viking Terminal commercial premises for compliance with the solid waste and recycling provisions of the County Plan. The same conclusion must be reached by this Court with respect to the constitutional scope of the Department's inspection authority.

The initial inquiry in any Fourth Amendment challenge must examine whether the activity being questioned constitutes a search. The Department will concede for purposes of this argument that its recycling compliance inspection of the Viking Terminal would have constituted a search. Once a determination is made that a "search" has occurred within the meaning of the Fourth Amendment, the government must show that the search was "reasonable" to survive constitutional scrutiny.

There are several ways in which a Fourth Amendment search may be found to be reasonable. The obvious means of satisfying the reasonableness standard is through the judicial issuance of a search warrant. However, it is also well-established that there are categories of warrantless searches that have also been upheld as reasonable. For example, administrative inspections in highly or pervasively regulated industries have been permitted without probable cause or

individualized suspicion as one of the exceptions to the warrant requirement and do not violate the constitutional proscription against "unreasonable searches and seizures." *New York v. Burger*, 482 U.S. 691, 712 (1987) (upholding suspicionless search of automobile junkyard); *Camara v. Municipal Court*, 387 U.S. 523, 540 (1967) (employing balancing test to assess validity of administrative search).

The administrative search exception has been used regularly to permit legislatively authorized warrantless inspections of commercial property in cases in which the government interest in conducting the search would be frustrated by requiring prior notice. *See Donovan v. Dewey*, 452 U.S. 594, 598-603 (1981). *See also United States v. Biswell*, 406 U.S. 311, 317 (1972) (administrative search exception extended to safety inspections of firearms dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (approving congressional scheme of warrantless searches and seizures in liquor industry in light of long history of regulation of this industry); *Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transp. Auth.*, 884 F.2d 709 (3d Cir. 1989) (random drug testing of employees in safety-sensitive positions was carefully and constitutionally tailored).

Our New Jersey courts also have applied these constitutional standards and found similarly that persons who engage in industries "subject to close supervision and inspection" have a diminished expectation of privacy. *In re Martin*, 90 N.J. 295, 313-14 (1982) (finding that casino employees have a "limited" expectation of privacy based on pervasive regulation of casino industry); *New Jersey Dep't of Envtl. Protection v. Duran*, 251 N.J. Super. 55, 62-63

(App. Div. 1991) (fishing industry is pervasively regulated and warrantless inspection of vessel in possession of illegal lobster tails upheld). In order to uphold this regulatory class of inspections or searches, the courts have established the following standard of review:

> [W]arrantless searches conducted under the pervasively regulated industry exception are deemed to be reasonable only so long as three criteria are met. First there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. . . . Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." . . . [And, f]inally, "the statute's inspection program, in terms of the certainty and regularity of its application [must] provid[e] a constitutionally adequate substitute for a warrant." *Burger, supra*, 482 U.S. at 702-03, 107 S. Ct. at 2644, 96 L. Ed. 2d at 614 (citations omitted).

[*New Jersey Transit PBA Local 304 v. New Jersey Transit*, 147 N.J. 259 (1997)]

There can be no genuine dispute that the recycling and disposal of waste materials by businesses in New Jersey is a pervasively regulated area and has been for several decades. There is a strong public interest in the orderly disposition of New Jersey's solid waste because it is "a matter of grave concern to all citizens" and "an activity thoroughly affected with the public interest," which has been mandated by the Legislature and recognized by the courts. *See, e.g.*, N.J.S.A. 13:1E-2; *A.A. Mastrangelo, Inc. v. Commissioner of Department of Envtl. Protection*, 90 N.J. 666 (1982);

Southern Ocean Landfill v. Mayor of Ocean Township, 64 N.J. 190, 193-94 (1974). The highly regulated system governing the management and disposal of solid waste in New Jersey grew out of a crisis that began in the 1970s as a result of wide-spread illegal practices in the then-private, unregulated waste disposal market and the closing of many landfills due to unsanitary conditions and noncompliance with newly enacted federal regulations. Mandatory recycling and reduction of the waste stream requiring ultimate disposal is a critical component of the SWMA. *Atlantic Coast Demolition & Recycling, Inc. v. Bd. Of Chosen Freeholders of Atlantic County et al.*, 48 F.3d 701 (1995). Thus, it is clear that the regulation of solid waste disposal and recycling by commercial establishments meets the substantial interest test under the Fourth Amendment.

The CEHA inspection program also meets the other two prongs of the *Burger* standard. Without the ability to conduct regular, unannounced inspections the Department has no way of determining whether the recyclable products generated by the Petitioner's owned and leased business properties are ending up in the proper end market. Waste items such as used motor fuel oil or tires cannot easily be traced or tagged once they leave the premises. An inspection can reveal whether recyclable materials are in the appropriate waste containers on site or whether Petitioner and his tenants have even established regular receptables and collection programs for such materials.

Furthermore, the inspections are regular, infrequent, nonintrusive and conducted only during reasonable and normal business hours. They are not conducted on the basis of unbounded discretion. Furthermore, the Department has never demanded an inspection of the personal residence of

Petitioner. Thus, the standard protocols of these inspections provide adequate protections and notice in lieu of a search warrant. *Transport Workers' Union*, *supra*, 884 F.2d at 711. It would be unreasonable and excessively burdensome for the Department to apply to a court for a search warrant in order to conduct routine environmental inspections of the thousands of business and commercial entities in Middlesex County.

In sum, the routine environmental inspection sought to be conducted at Petitioner's business properties was reasonable and did not violate Petitioner's constitutional right to be free from "unreasonable searches and seizures". Thus, the writ should be denied.

POINT II

MIDDLESEX COUNTY HEALTH DEPARTMENT IS ENTITLED BY STATUTE TO ITS FEES UPON PREVAILING ON PETITIONER'S CHALLENGE TO THE INSPECTION

Petitioner has also raised the argument that the Department is not entitled to the fees and costs it has been forced to incur by Petitioner's own unwarranted refusal to allow the inspection. Having defended its right to conduct the regulatory inspection, the Department clearly is entitled to its reasonable fees. N.J.S.A. 13:1E-9(d)(2); County Plan, Ch. 2, Section D(11).[2]

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2. Middlesex County Public Health Department Enforcement Protocol provides:

> The violator [of rules and regulations governing solid waste], if found guilty, shall be liable to pay the Court

(Cont'd)

Moreover, Petitioner had adequate notice that fees would be sought by the Department if judicial intervention to enforce the SWMA and the County Plan was necessitated by Petitioner's actions. *Id.* The Verified Complaint also apprised Petitioner that fees would be demanded as part of the relief sought. The Order of the Court below set forth that the reasonable level of those fees was $5,000 and would not be due and owing unless and until the Department prevailed on the appeal. (Pet. App. 12a)

While the Department sought fees in the amount of over twelve thousand dollars ($12,000), which were genuinely incurred by it in prosecuting its Order to Show Cause, and has now had to incur the additional legal expenses of the appeal and this petition, the Department did not take a cross-appeal on the issue and will abide by the trial judge's assessment. The Department and the lower court were fully justified in making this assessment against Petitioner. But for his refusal to allow the fully authorized Department inspectors to do their job, these legal costs would not have been incurred. It is unreasonable to expect the other businesses in Middlesex County to bear the financial burden of Petitioner's obstinacy.

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> Judgement. . . . In addition, any person(s) found guilty of a solid waste violation shall be liable for all costs incurred by the County of Middlesex including all litigation costs, fees, and expenses.

CONCLUSION

For the reasons set forth above, the Middlesex County Health Department respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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